I would accordingly allow the plaintiffs' appeal and enter judgment for the plaintiffs in the sum of $37,157.50 together with interest thereon at the rate of 6% pa from the date of the writ of summons, namely, 12 April 1990, the costs of this appeal and the costs in the district court. The defendant's appeal will be dismissed with costs.

Appeal allowed.

Solicitors: *Fam Tay & Lee; Chan Tan & Partners.*

Reported by *Kevin Mathews*

Syed Yacob v Syed Alwee & Ors

HIGH COURT (SINGAPORE) — ORIGINATING SUMMONS NOS 936 OF 1986 AND 937 OF 1986
CHAN SEK KEONG J
23 NOVEMBER 1990

Trusts and Trustees — Construction of trust deed — Rectification of trust deed — Difference between construction and rectification — Standard of proof of rectification

Civil Procedure — Issue estoppel — Cause of action estoppel

Words and Phrases — 'Grandchildren'

Syed Shaikh, a wealthy landowner, had with his brother, Syed Mohamed, created a settlement ('the 1888 settlement'), the subject matter of Originating Summons No 936 of 1986. Syed Shaikh, in addition, alone had created five other settlements (of which one, the 1893 settlement, was the subject matter of Originating Summons No 937 of 1986). The issue in the present cases related to the clauses in the two settlements which provided for the distribution of capital to '. . . such persons or persons then living as is or are the grandchild or grandchildren of the settlors or either of them or' their brother. The plaintiff sought either a declaration that the capital of the settlement was distributable not only to the abovenamed grandchildren but also in the case of those grandchildren who died prior to the date of distribution, that their issue would be entitled to share per stirpes in the distribution, or a rectification of the capital clause by deleting certain words and adding other words so that it was not the grandchildren of the settlors and their brother who would be entitled to the capital but only the successors of their brother who would be so entitled. It was contended by the trustees and beneficiaries that the plaintiff was estopped by the decision in *Re Alkaff's Settlement*,[1] a decision on the construction of the capital clause of the 1888 settlement, from relitigating the effect of the capital clause.

Held, dismissing the applications:

(1) The decision in *Re Alkaff's Settlement*[1] operated as a cause of action estoppel as well as an issue estoppel against the plaintiff in relation to the construction claim as he is asserting as a cause of action, the subject matter of the previous determination, which is binding on him by reason of the representation order made by the court in that decision until it is reversed by a higher court.

(2) The proper course for the plaintiff on the point of the construction would be to have applied to the Court of Appeal for an extension of time to appeal and to adduce new evidence before the court.

(3) Rectification is different from construction. The primary purpose of a construction action in relation to an instrument is to ascertain the intention of the maker from the words used by him, whereas the primary purpose of a rectification action is to substitute new words for those actually used by the maker to reflect his true intention.

(4) Extrinsic evidence could only be adduced to construe a document if it was ambiguous. The cases showed that the word 'grandchildren' was not always plain, precise and unambiguous. The court was therefore willing to admit the evidence adduced by the plaintiff for the purpose of determining the intention of Syed Shaikh.

(5) The evidence adduced however showed that Syed Shaikh intended that only the living grandchildren should share in the capital. The most telling piece of evidence was that he had in relation to the income of the trusts expressly provided for the manner in which the children of the deceased beneficiaries were to take their parents' shares.

(6) The standard of proof for rectification was 'beyond all doubt' or 'the clearest and the most certain demonstration of error'. This burden becomes more difficult to discharge with the passage of time. Here the plaintiff was trying to discharge the burden 100 years after the first settlement. He could not possibly succeed on the claim for rectification when, on the same evidence, he had failed on the construction issue. Both actions were thus dismissed.

[*Editorial Note*: The plaintiff has appealed to the Court of Appeal vide Civil Appeal Nos 126 and 127 of 1990.]

Cases referred to

1 *Re Alkaff's Settlement* [1971] 1 MLJ 242 (folld)
2 *Re Syed Shaikh Alkaff* [1923] 2 MC 38 (refd)
3 *Henderson* v *Henderson* [1843-60] All ER Rep 378 (refd)
4 *Hoystead* v *Commissioner of Taxation* [1926] AC 155 (refd)
5 *Re Koenigsberg* [1948] 1 Ch 727 (refd)
6 *Badar Bee* v *Habib Merican Noordin* [1909] AC 615 (refd)
7 *New Brunswick Railway* v *British & French Trust Corp* [1936] 1 All ER 13 (refd)
8 *Thoday* v *Thoday* [1964] P 181 (refd)
9 *Mills* v *Cooper* [1967] 2 All ER 100 (refd)
10 *McIlKenny* v *Chief Constable of the West Midlands* [1980] 2 All ER 227 (refd)
11 *Re Manly's Will Trusts (No 2)* [1976] 1 All ER 673 (refd)
12 *Arnold* v *National Westminster Bank* [1988] 3 All ER 977 (refd)
13 *Arnold & Ors* v *National Westminster Bank* [1990] 1 All ER 527 (refd)
14 *National Westminster Bank* v *Arthur Young McClelland Moores & Co* [1985] 1 WLR 1123 (refd)
15 *Hunter* v *Chief Constable of the West Midlands Police* [1982] AC 529 (refd)
16 *Lawlor* v *Gray* [1984] 3 All ER 345 (refd)
17 *Re Waring (Decd)* [1948] 1 All ER 257 (folld)
18 *Re Alsagoff* [1958] MLJ 264 (distd)
19 *Whitby* v *Mitchell* (1890) 44 Ch D 85 (refd)
20 *Syed Ali & Ors* v *Syed Omar & Ors* (1918) 15 SSLR 103 (distd)
21 *Khoo Hooi Leong* v *Khoo Hean Kwee* [1926] AC 529 (refd)
22 *Overstone Ltd* v *Shipway* [1962] 1 All ER 52 (refd)
23 *Re Hall* [1932] 1 Ch 262 (refd)
24 *Bonhote* v *Henderson* [1895] 1 Ch D 742 (refd)
25 *Banks* v *Ripley* [1940] 1 Ch 719 (refd)
26 *Whiteside* v *Whiteside* [1950] 1 Ch 65 (refd)

27 *Re Butlin's Settlement Trusts* [1976] 1 Ch 251 (refd)
28 *Lister* v *Hodgson* (1867) 4 Eq 30 (folld)
29 *Weir* v *Van Tromp* (1900) 16 TLR 531 (folld)

B Mohan Singh for the plaintiff.
Eric Choa for the first, second and third defendants (trustees).
Daniel Poon for the second defendant (living grandchildren in order of court dated 25 November 1987).
G Raman for the Singapore income beneficiaries.
YR Jumabhoy for Sharifa Zahra bte Ali and Syed Mohd Hussain Abdullah Alkaff.

Cur Adv Vult

Chan Sek Keong J: *Background*

Syed Shaikh bin Abdulrahman Alkaff ('Syed Shaikh') was a wealthy landowner in Singapore. He had two brothers, viz Syed Mohamed bin Abdulrahman Alkaff ('Syed Mohamed') and Syed Abdullah bin Abdulrahman Alkaff ('Syed Abdullah'). They were Hadramaut Arabs who were born and died in Hadramaut, Arabia. Syed Abdullah died in 1297 AH (1879 AD) leaving four sons and two daughters surviving him. Syed Mohamed died in about 1900, leaving no issue. Syed Shaikh died in Tarim in Arabia on 21 March 1910, leaving seven sons and three daughters surviving him. Upon the death of Syed Shaikh, two of his wills were found and the later one made on 6 February 1910 was probated in Probate No 176 of 1910. As at 3 August 1986, (a) there were living 38 male grandchildren and 39 female grandchildren of both Syed Shaikh and Syed Abdullah, and (b) 44 male and female grandchildren of the two Alkaff brothers had died.

Syed Shaikh and Syed Mohamed were the settlors of a settlement contained in an indenture dated 21 December 1888 whereby they settled their immovable properties in Singapore as described in the schedule thereto on the trusts described therein ('the 1888 settlement'). Subsequently, Syed Shaikh alone created five other settlements of his immovable properties in Singapore, starting with an indenture dated 17 March 1893 ('the 1893 settlement') and followed by those of 16 October 1898 ('the 1898 settlement'), 8 October 1901 ('the 1901 settlement'), 4 May 1905 ('the 1905 settlement') and 25 December 1906 ('the 1906 settlement'). All the indentures were made in the English language and executed before English solicitors in Singapore. The six settlements are known in the legal profession as 'the six Alkaff settlements'.

The respective dates of expiration of the income trusts of the six Alkaff settlements are as follows: (1) the 1888 settlement — 2 December 1986; (2) the 1893 settlement — 2 December 1986; (3) the 1898 settlement — 23 July 1991; (4) the 1901 settlement — 23 July 1991; (5) the 1905 settlement — 28 April 1999; and (6) the 1906 settlement — 28 April 1999.

The 1888 settlement is the subject matter of OS 936 of 1986 and the 1893 settlement is the subject matter of OS 937 of 1986. Each of the settlements created income trusts for a prescribed period at the end of which the corpus was directed to the distributed to certain beneficiaries. The prescribed period in the 1888 settlement was 21 years from the death of the survivor of 27 lives in being named in the second schedule thereto (which included two grandchildren) or until all the children of the settlors and of their deceased brother, Syed Abdullah, being dead, the youngest child of such children who should live to attain the age of 21 years shall attain that age, whichever was the shorter. The prescribed period in the 1893 settlement was similar except that there were 17 named lives in being (which included three grandsons).

Under the 1888 settlement, the income accruing from the capital was distributable to the settlors during their lives in equal shares, then wholly to the survivor, and on his death:

> Upon trust to divide the same annually among such of the children or remoter issue of the settlors and of the said Syed Abdullah bin Abdulrahman Alkaff as shall from time to time be living during their respective lives in the proportion of two shares to males and one share to females but so that the issue of a deceased child shall take among them the share only which their parent or parents would have taken if living in the same proportions as aforesaid between males and females.

The income under the 1893 settlement was also distributable to the same Alkaff brothers and in the same manner except that on the death of the survivor of them, the income became distributable annually only to the male children or remoter male issue of the three Alkaff brothers in equal proportions, so that the issue of a deceased child shall take among them the share which their parent or parents would have taken if living.

The actions before me relate to the distribution of the capital of the 1888 and the 1893 settlements. The relevant clause ('the capital clause') in the 1888 settlement is as follows:

> Upon trust nevertheless at the expiration of the [trust period]..... for *such* person or *persons then living as* is or *are the* grandchild or *grandchildren of the settlors* or either of them or the said Syed Abdullah bin Abdulrahman Alkaff deceased ... or in the event of a total failure of *issue* of [the three Alkaff brothers] then for such person or persons as would then be entitled thereto according to Mohammedan law ... (My emphasis.)

The capital clause in the 1893 settlement is similar except that the initial gift is limited to 'male grandchildren'. In each of the present actions, the plaintiff has sought (a) a declaration as to the true meaning of the expression 'grandchildren' in the capital clause and (b) rectification of the said clause to reflect the intention of the settlors and of Syed Shaikh respectively.

Construction action/issue in OS No 41 of 1970

The construction of the capital clause in the 1888 settlement was the subject matter of the action in OS 41 of 1970. That was a construction summons taken out by Syed Ahmed bin Mohamed bin Hussain bin Abdullah Alkaff, a great-grandson of Syed Abdullah, as plaintiff. Pursuant to a representation order, he also represented all the great-grandchildren, including the plaintiff in the actions before me. The first defendant in that action was a grandson of Syed Shaikh and he represented the grandchildren as a class. The second defendants were the trustees of the said settlement.

In that action, the plaintiff had sought a construction of the expression 'grandchildren' to mean 'issues, however remote' then living, of the Alkaff brothers. It was there contended: (a) that on a comparison of the provision relating to the disposition of the income and that relating to the corpus, the settlors had intended to benefit the greatest number of issues: (b) that having succeeded in tying up the corpus for 98 years, the settlors could not have intended to benefit only the grandchildren as none might be alive at the end of the period: and (c) that as the event upon which the contingent gift were to take effect was expressed to be the total failure of 'issue' and not 'grandchildren', the settlors had intended that the initial gift would not fail so long as there was any issue, however remote. That must mean that the expression 'grandchildren', on its proper construction, meant issues of any degree.

Choor Singh J, in a written judgment delivered on 1 March 1971 (reported as *Re Alkaff's Settlement*,[1] held that the expression 'grandchildren' meant children of one's children. His reasoning is set out in the following passage:

> I am unable to accept the submissions of counsel for the plaintiff. I agree with and accept the submission of counsel for the first defendant that the disposition of the corpus in the 1888 settlement consists of two gifts, first, a gift to the settlors' grandchildren and the grandchildren of their brother Syed Abdullah bin Abdulrahman Alkaff and in the event that there are no such grandchildren alive at the date of distribution, then there is a substitutional gift, namely, that the estate is to be distributed according to Muslim law. In my opinion the words 'grandchild or grandchildren' must be given their ordinary meaning. The grandchildren of the settlors and of their brother Syed Abdullah bin Abdulrahman Alkaff have been preferred as the first object of the settlors' bounty. As the estate was being tied up for a period of nearly one hundred years, the settlors contemplated that there may not be any such grandchildren alive at the date of distribution and they therefore provided that if there are no grandchildren alive at the date of distribution, then the estate is to be distributed according to Muslim law. It is not quite correct to say that the great grandchildren have been excluded; they come in but only if there are no grandchildren alive at the date of distribution. As long as there are grandchildren to take, the great grandchildren get nothing. The words 'grandchild' and 'grandchildren' are plain, precise and unambiguous and the court must give effect to these words. In the words of the Master of the Rolls in the *Earl of Orford*'s case 'it would be against all rules of construction to control the operative and effective part of a clause by ambiguous words' appearing elsewhere. In my opinion the *Earl of Orford*'s case is clear authority for the proposition that if the words used in the original gift are clear and unambiguous the court must give effect to these words and uphold the original gift. To the same effect is the decision in *In Re Rawlinson*, where Joyce J said that if the words in the original gift are plain and unambiguous taken by themselves 'it would not be right to allow the construction of the gift over in one particular event mentioned, which event has not happened, to compel the court to place a forced and improper construction upon the meaning of the original gift when these words are as plain as they are here'.

The plaintiff filed a notice of appeal but withdrew it. An application for rectification was contemplated but was not translated into action. Efforts to settle the dispute reached the penultimate stage of a deed of family arrangement being drawn up. Then occurred the discovery of a will of Syed Shaikh dated 1 Rabi Awal 1316 (19 July 1898 AD) with a codicil dated 2 Jamadil Awal 1320 (7 August 1902 AD) (collectively, 'the 1898 will') both made in Arabic. It is not clear when and where the 1898 will was discovered, but a copy was brought to Singapore in 1983. Disquiet amongst some of the descendants intensified, but further negotiations came to nought. During this period, the plaintiff in June 1986 also received copy of a handwritten document in Arabic dated 24 Shawal 1320 (24 January 1903 AD) which the plaintiff identified as a 'vow' or '*wakf* ('the 1902 vow').

Reliefs in actions

I set out below the reliefs claimed by the plaintiff in OS 936/86 which correspond to those claimed in OS 937/86. Paragraphs 1 and 2 sought the following declarations:

1 A declaration that the provisions in the said settlement whereby the settlors limited the persons who would benefit in the corpus of the settlement to such person or persons then living as is or are the grandchild or grandchildren of the settlors or their brother Syed Abdullah, does not accurately reflect the true intention of the settlors at the time of making the said settlement.

2 A declaration that the intention of the settlors at the time of making the said settlement was that the corpus of the said settlement on the date of distribution should be distributed on the arrival of the date of its distribution in accordance with Islamic law.

Paragraph 3 sought a declaration that the corpus of the each of the said settlements was, on the date of distribution thereof, distributable among:

(a) such person or persons then living or died prior to the date of distribution who are the children of the settlors and their brother Syed Abdullah bin Abdulrahman Alkaff the issue of those children who died prior to the date of distribution to take per stirpes to the share of the deceased children; or

(b) such person or persons then living as is or are the issue however remote of the said settlors and their brother Syed Abdullah bin Abdulrahman Alkaff in equal shares (without discrimination) in accordance with Islamic law; or

(c) such person or persons then living or died prior to the date of distribution who are the grandchildren of the settlors and their brother Syed Abdullah bin Abdulrahman Alkaff the issue of those grandchildren who died prior to the date of distribution to take per stirpes to the share of the deceased grandchildren.

I should observe that the construction given by Choor Singh J has not been included in any of the constructions mentioned in para 3. I have, however, included in the table below Choor Singh J's construction in order to highlight the essential differences between the four constructions:

Construction	Beneficiaries	Shares/Per
(a)	Living/dead children, issue taking deceased children's share	Stirpes
(b)	Living issue, however remote	Capita?
(c)	Living/dead grandchildren, great grandchildren taking deceased grandchildren's share	Capita/Stirpes
Choor Singh J	Living grandchildren, [(b) rejected, (a) and (c) not argued]	Capita (M/F = 2:1)

Choor Singh J applied English law in the construction of the 1888 settlement. In the present actions, the affidavit filed by the plaintiff herein claimed that Islamic law was the proper law of both the settlements and that Syed Shaikh's intention under the capital clause should be construed accordingly. However, this point was abandoned by his counsel at the start of the trial. In my view, the implied concession that the settlements were subject to and should be construed in accordance with English law was correct: see *Re Syed Shaikh Alkaff*.[2]

In paragraph 4, the plaintiff sought rectification of the capital clause by deleting the words:

> for such person or persons then living as is or are the grandchild or grandchildren of the settlors or either of them or the said Syed Abdullah bin Abdulrahman Alkaff deceased

and substituting therefor the following words:

> for our successors and the successors of the said Syed Abdullah bin Abdulrahman Alkaff deceased in accordance with the tenets of Islamic law.

Paragraph 5 sought the court's direction as to whether the clause, if rectified, would mean construction (a), (b) or (c).

Paragraph 6(i) sought the court's ruling as to whether the proper law of the 1888 settlement and/or the distribution of the corpus after the conversion of the immovable properties into movable property would be Islamic law, having regard to all the circumstances, and in particular (a) the settlor's personal law; (b) Syed Shaikh's three wills; (c) the 1902 vow; (d) the background, upbringing and customs of the settlors; (e) the events which have happened and events which will happen, in particular the conversion after the date of distribution of the assets of the settlement to movables.

Paragraph 6(ii) sought the court's opinion as to whether the settlors were precluded by their personal law from settling their properties inter vivos in a manner which discriminated against some of their descendants, and if the answer to para 6(ii) were in the affirmative, the court was asked in para 6(iii) to determine whether the relevant clause would be void on the ground that it was against the settlor's personal law.

The grounds in support of the various constructions and for rectification as set out in the plaintiff's affidavit, affirmed on 3 August 1986, may be summarized as follows: (1) that the Alkaff brothers were Hadramaut Arabs and Muslims of the Shafei sub-school of the Sunni sect; they were born and grew up in Tarim, South Yemen and were educated there solely in Arabic with emphasis on Arabic history, Sharia (Muslim law and custom); they did not write or speak English and had a limited knowledge of Malay; (2) they were Sayeds and were extremely conservative and devout Muslims; (3) the children of the deceased grandchildren had been denied their inheritance by Choor Singh J's decision, which was discriminatory under and contrary to Islamic law; (4) the contents of the 1902 vow and of the 1898 will disclosed the true intention of Syed Shaikh; (5) certain facts were not put before or arguments made to Choor Singh J, eg the issue of the proper law (which was assumed to be English law) applicable to the 1888 settlement, the religious background of the Alkaff brothers, the wills of Syed Shaikh (including the 1898 will), the fact that some grandchildren were also lives in being, etc.

Issues at trial

At the start of the hearing, counsel for the plaintiff informed the court that he would not be proceeding with the declarations in paras 1, 2, 3(b) and (c) in both actions, and that he would only proceed on paras 3(a), 4 and 5. No objection was raised to this course of action by the other parties. Before the conclusion of the hearing, counsel for the plaintiff also abandoned para 5 when he sought and obtained the leave of the court, there being no objection from the other parties, to amend para 4 in both actions to read as italicized below:

for such person or persons then living *or died prior to the date of distribution the issue of those grandchildren who died prior to the date of distribution to take per stirpes to the share of the deceased grandchildren* as is or are the grandchild or grandchildren of the settlors etc.

Construction issue and res judicata in OS 936/86

The first issue of law I have to consider is the issue of estoppel in relation to the construction claim. It was contended by both counsel for the trustees and for the beneficiaries under Choor Singh J's decision that the plaintiff was estopped from relitigating the effect of the capital clause as he was bound by the judgment in OS No 41/70. The following authorities were cited: *Henderson* v *Henderson*,[3] *Hoystead* v *Commissioner of Taxation*,[4] *Re Koenigsberg*[5] and *Badar Bee* v *Habib Merican Noordin*.[6]

Counsel for the plaintiff contended otherwise, on the following grounds: (i) that any estoppel, if applicable in this action, was issue estoppel and not cause of action estoppel, (ii) that whilst cause of action estoppel was absolute, issue estoppel was not and that a decided issue could be reopened in special or exceptional circumstances, eg the discovery of new evidence which might show that the previous decision was wrong, (iii) that the 1902 vow and the 1898 will provided evidence that Choor Singh J's interpretation was wrong, and, as such, constituted exceptional circumstances, (iv) that no hardship would be caused to the qualified beneficiaries as their shares would only be reduced on the new construction and not totally extinguished. The following decisions were cited: *New Brunswick Railway* v *British & French Trust Corp*;[7] *Thoday* v *Thoday*;[8] *Mills* v *Cooper*;[9] *McIlKenny* v *Chief Constable of the West Midlands*;[10] *Re Manly's Will Trusts (No 2)*[11] and *Arnold* v *National Westminster Bank*.[12]

The present state of English law on res judicata is fully discussed in the judgment of Dillon LJ in *Arnold* v *National Westminster Bank*.[13] I quote the following passages from the judgment:

> The simplest and oldest form of estoppel per rem judicatam is what is now called 'cause of action estoppel'. That is referred to by Lord Reid in *Carl-Zeiss-Stiftung* v *Rayner & Keeler Ltd (No 2)* [1966] 2 All ER 536 at 549-550, [1967] 1 AC 853 at 909-910.
>
> ....
>
> Cause of action estoppel binds absolutely. There is no qualification, such as 'except in special circumstances'. The only way round a decision on a point of law, which is subsequently held by a higher court in proceedings between other parties to have been erroneous, is to appeal, if necessary getting leave to appeal out of time. An instance of that, to which we were referred, is *Property and Reversionary Investment Corp Ltd* v *Templar* [1978] 2 All ER 433, [1977] 1 WLR 1223.
>
> ....

There have been two separate extensions of the doctrine of res judicata. One is what is called 'extended res judicata'. The classic statement of this is in the judgment of Wigram V-C in *Henderson* v *Henderson* (1843) 3 Hare 100 at 114-115, [1843-60] All ER Rep 378 at 381-382:

> '... I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except *under special circumstances*) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, *except in special cases*, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.' (My emphasis.)

...

The second development from cause of action estoppel is now called issue estoppel and was recognized in the *Carl-Zeiss-Stiftung* case. The phrase 'issue estoppel' was apparently first used in Australia and was introduced in this country by Diplock LJ in *Thoday* v *Thoday* [1964] 1 All ER 341 at 352, [1964] P 181 at 197, where he said:

> 'The particular type of estoppel relied on by the husband is estoppel per rem judicatam. This is a generic term which in modern law includes two species.'

He then dealt with the first, which he called 'cause of action estoppel', and then said ([1964] 1 All 341 at 352, [1964] P 181 at 198):

> 'The second species, which I will call 'issue estoppel', is an extension of the same rule of public policy. There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. If in litigation on one such cause of action any of such separate issues whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either on evidence or on admission by a party to the litigation, neither party can, in subsequent litigation between them on any cause of action which depends on the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was.'

....

The next step in the development of the law of issue estoppel was that in *Fidelitas Shipping Co Ltd* v *V/O Exportchleb* [1965] 2 All ER 4, [1966] 1 QB 630 this court applied the principles of *Henderson* v *Henderson* (1843) 3 Hare 100, [1843-60] All ER Rep 378 to issue estoppel . . .

We are however bound by *Fidelitas Shipping Co Ltd* v *V/O Exportchleb* [1965] 2 All ER 4, [1966] 1 QB 630. *Henderson* v *Henderson* (1843) 3 Hare 100, [1843-60] All ER Rep 378 is concerned with causes of action or (on *Fidelitas*) issues which were not raised in the earlier proceedings, whereas, as counsel for the landlords has stressed as the cornerstone of his argument on the present appeal, we are concerned with an issue which was fully litigated in the proceedings before Walton J on the 1983 rent review. It seems to me, however, with all respect to the doubts expressed by others, that the development of the law in the *Fidelitas Shipping Co Ltd* case flows logically from the earlier cases, and that the answer to the disquiet felt by their Lordships is to be found in the proper application of the words used by Wigram V-C 'except under special circumstances' (see (1843) 3 Hare 100 at 115, [1843-60] All ER Rep 378 at 381). Proper application of those words should achieve the objective of Lord Upjohn, where he said in the *Carl-Zeiss-Stiftung* case [1966] 2 All ER 536 at 573, [1967] 1 AC 853 at 947:

> 'All estoppels are not odious but must be applied so as to work justice and not injustice, and I think that the principle of issue estoppel must be applied to the circumstances of the subsequent case with this overriding consideration in mind.'

Arnold's case[13] was concerned with issue estoppel and not cause of action estoppel. In that case, the tenants, who were partners in Arthur Young McClelland Moores & Co, had a 32-year sub-underlease of the premises from October 1976 to June 2008 at the yearly rent which was subject to review on 24 June 1983, 1988, 1993, 1998 and 2004. The lease contained a formula for determining the new rent at the review dates. The formula presupposed a hypothetical lease for the unexpired residue of the term, and the question arose whether that lease did or did not include the rent review provisions in the actual sub-underlease. The evidence in 1983 was that if it did not, the rent from June 1983 would be 20% higher than if it did. The tenants' primary claim was for the rectification of the sublease but they also claimed for a determination as to the basis on which the periodic reviews were to be conducted. The bank applied to strike out the second claim on the ground that, in relation to the period from June 1983 to 1988, the same issue between the parties had already been decided against the tenants in 1985 by Walton J (reported as *National Westminster Bank* v *Arthur Young McClelland Moores & Co*[14]). The tenants contended that they were entitled to relitigate the issue in respect of the period from June 1988 to 1993 as later decisions on rent review clauses (including one approved by the Court of Appeal) indicated that Walton J's decision was wrong.

The Court of Appeal unanimously upheld the decision of the Vice-Chancellor that an issue determined by court could, by way of exception to the doctrine of estoppel per rem judicatam, be relitigated if special or exceptional circumstances justified it, and that such circumstances could comprise matters of facts as well as the law. The court held that such special circumstances existed in that Walton J's decision was plainly wrong.

Dillon LJ referred to *Mills* v *Cooper*[9] which, as explained in *Hunter* v *Chief Constable of the West Midlands Police*,[15] established that the binding nature of an issue estoppel in relation to a point that had been litigated in earlier proceedings might be qualified if new *facts of sufficient cogency* were brought forward in a second action. Staughton LJ, concurring, said that 'special circumstances' should, for policy reasons, be construed narrowly whilst Mann LJ, also concurring, said that 'special circumstances' should not be defined, and was a matter for the judge in each case.

In *Lawlor* v *Gray*[16] at p 350, Peter Gibson J differentiated between the two concepts neatly in these words:

> Issue estoppel . . . prevents contradiction of a previous determination, whereas cause of action estoppel prevents reassertion of the cause of action the subject matter of the previous determination.

In my view, Choor Singh J's decision in OS No 41/70 operates as a cause of action estoppel as well as an issue estoppel against the plaintiff. He is asserting as a cause of action the subject matter of the previous determination which is binding on him by reason of the representation order until it is reversed by a higher court: see *Re Waring (Decd)*,[17] a case where a party sought to relitigate the construction of a will given by a previous court. In *Badar Bee*'s case,[6] an appeal from one of the Straits Settlements, the appellant petitioned to have it declared that the devise and gifts contained in the sixth clause of the testator's will were void, and that the property and income comprised therein fell into intestacy. In 1872, the court in an earlier suit relating to the same will had declared the said gifts void and that they 'fell into the undevised residue of the testator's estate'. Thereafter, the gifts which were of annual sums were paid to the testator's next of kin (on an intestacy) with the consent of all the parties interested. In 1891 in another suit relating to the said clause, the court had declared that the defendants, who included the trustees of the will, were estopped from contending that the said annual sums were not wholly undisposed of. On these facts, the Privy Council said:

> The result is that it appears that the point raised by this appeal has already been adjudicated upon. There is here, as there was in the case of *Peareth* v *Marriott*, to which Mr Levett referred, a decree inter partes on the very same subject. In the words of the Digest, lib xliv, t 2, s 7, '*exceptio rei judicatae obstat quotiens eadem quaestio inter easdem personas revocatur.*' It is not competent for the court, in the case of the same question arising between the same parties, to review a previous decision not open to appeal. If the decision was wrong, it ought to have been appealed from in due time. Nor can the residuary legatees be heard to say that the value of the subject-matter on which the former decision was pronounced was comparatively so trifling that it was not worth their while to appeal from it. If such a plea were admissible, there would be no finality in litigation. The importance of a judicial decision is not to be measured by the pecuniary value of the particular item in dispute.

Badar Bee's case[6] was decided before the refinement of the doctrine of res judicata into its two distinct classes, but nevertheless, the Privy Council's decision falls into the class of cause of action estoppel. Accordingly, the plaintiff fails in this action on construction. The proper course for him to have taken was to have applied to the Court of Appeal for extension of time to appeal and to adduce the new evidence before the court.

The Alsagoff cases 1917-1958

Counsel for the plaintiff referred to the decision of Whyatt CJ in *Re Alsagoff*[18] in support of his argument that the 1888 settlement should have been construed together with the two known wills of Syed Shaikh, which wills had not been produced before Choor Singh J. The same argument applies to the 1898 will. Syed Alsagoff was also a wealthy Arab who had made his fortune in Singapore. He died on 27 March 1875, leaving two wills, one in English dated 30 December 1868 and the other in Arabic dated 20 December 1868 *which was annexed and formed part of the English will, and which the testator directed should be taken for and read as part of the English will.* Both were admitted to probate. By his wills, Syed Alsagoff created a *wakf* or trust of certain immovable property in perpetuity, the income of which was to be distributed for certain charitable objects and also for the benefit of his descendants *in perpetuity*. Having been advised that the perpetual trusts might be void, Syed Alsagoff also provided in his wills, alternative income trusts for a period of lives in being and 20 years. By 1917, there were two grandchildren (who were income beneficiaries) who were born after Syed Alsagoff's death and they had died leaving children. If these great-grandchildren succeeded to their parents' shares, there would be two successive unborn generations taking life interests in the income. Certain descendants as or representing the estates of the next of kin of Syed Alsagoff took out an action in 1917 to have the alternative trusts declared void on the ground that they contravened the rule in *Whitby* v *Mitchell*[19] (sometimes called 'old' rule against perpetuities and also the rule against double possibilities). The defendants to the action were the executors, some of his grandsons and the Attorney General (representing the charitable objects of the trusts).

The court had to decide whether the rule in *Whitby* v *Mitchell*[19] was applicable even though the alternative trusts did not infringe the modern rule against perpetuities. Bucknill CJ held that *Whitby* v *Mitchell*[19] had no application on the ground that the legal conditions applicable to the transmission and devolution of real property in Singapore were different from those applicable in England. The judgment was unanimously upheld by the Court of Appeal [*Syed Ali & Ors* v *Syed Omar & Ors*[20]]. Woodward J delivered the leading judgment. He held that the intention of the testator in using the expression 'descendants' must be ascertained by reading both the English and the Arabic wills together, and in so doing, held that the testator had intended to use that expression to include the remotest generation coming into being during the prescribed period, and that on the death of the parent each succeeding generation should take, per stirpes, a life interest in the income till the time of distribution (subject only to the share of every male being twice that of every female, *as directed by the Arabic will*). The other two members of the court delivered concurring judgments.

On 5 December 1941, the trustees of the estate commenced OS 168 of 1941 for construction of the English will as to the entitlement shares of certain beneficiaries. Sir P McElwaine CJ delivered judgment on 12 February 1942 and held that the two daughters and the children of a predeceased son of Shariffa Bahia, a granddaughter of Syed Alsagoff, were entitled to the income which had passed on the death of Shariffa Bahia in the proportion of one-third to each of the daughters and the remaining one-third to the children of the deceased son.

Thereafter, the trustees distributed the income in accordance with this judgment until 1956 when three of the infant children of the deceased son, through their next friend, took out Suit 1027 of 1958 to set aside the judgment in OS 168 of 1941 on the ground that it was wrongly decided as the Arabic will was not drawn to the attention of the court. Whyatt CJ considered first the question whether the income should be distributed in the proportions claimed by the plaintiffs (ie one-half share). He agreed that the Arabic will should have been read with the English will, and when so read, it was clear that Alsagoff had expressly provided that the share of every male beneficiary would be twice that of every female beneficiary. He added that 'the very same point on the very same English and Arabic wills was considered by the Court of Appeal as long ago as 1918 . . .'. The plaintiffs' construction was therefore correct. The Chief Justice should then have proceeded to consider the issue whether the 1942 judgment could be set aside. But this issue was not considered as counsel for the children of Shariffa Bahia's daughters *conceded* that if the Arabic will was in fact not before the court in 1942 the judgment in OS 168/41 should be set aside. Accordingly, the Chief Justice proceeded to consider what the factual situation was on the evidence before him. He found that the Arabic will was never produced to the court in 1942 and on that finding set aside the judgment in OS 168/41.

In my view, *Re Alsagoff*[18] does not assist the plaintiff in this action with respect to the admissibility of the vow and the three wills. Whyatt CJ's decision that the English and the Arabic wills be read together was based on the testator's direction. Extrinsic evidence is not admissible to construe a document except where there is an

ambiguity: see *Khoo Hooi Leong* v *Khoo Hean Kwee*.[21] With respect to estoppel, the issue was not raised at all. Moreover, in my view, Whyatt CJ was able to set aside the judgment of his predecessor not because of the law but because the parties had agreed to that course of action. It is trite law that no court may set aside a final judgment or order of another court of competent jurisdiction, except on appeal. Finally, *Re Alsagoff*[18] cannot enable this court to give a judgment different from that of Choor Singh J as neither judgment would prevail against the other.

Rectification in OS 936 of 1986

Counsel for the trustees did not address the court on estoppel in relation to rectification but only on admissibility of the plaintiff's evidence which I shall consider later.

With respect to estoppel, I agree with counsel for the plaintiff that cause of action estoppel does not apply to the 1888 settlement. The reason is that rectification is different from construction. The ingredients of the causes of action are not the same. The primary purpose of a construction action in relation to an instrument is to ascertain the intention of the maker from the words used by him, whereas the primary purpose of a rectification action is to substitute new words for those actually but mistakenly used by the maker in order to reflect his true intention. In *Lawlor* v *Gray*,[16] Peter Gibson J held, following the Court of Appeal's decision in *Overston Ltd* v *Shipway*,[22] that cause of action estoppel did not apply to a claim for damages for breach of contract after the plaintiff had succeeded in a claim in a previous action for breach of an obligation to repay a debt, as the two claims were not of the same nature.

It is therefore necessary for me to decide whether on the evidence the plaintiff has proved a case in rectification. However, as this claim has also been made in OS 937/86, it is more convenient if I consider the matter in that action.

Causes of action/issues in OS No 937/86

As I have stated earlier, the two causes of action in this summons are the same as those pleaded in OS 936/86. For the reasons I have given, neither cause of action estoppel nor issue estoppel prevents the plaintiff from litigating both causes of action in this proceeding. There is no question of any cause of action being relitigated as the subject matter of Choor Singh J's decision was and arose from the 1888 settlement and no other, even if the parties were the same and the issue of construction was the same. A certain degree of judicial support for this conclusion is found in the House of Lords' decision in the *New Brunswick Railway* case,[7] where it was held that the defendants who had issued a series of 6,000 gold sterling bonds were not estopped from raising the defence that they were bound only to pay £100 sterling on each bond even though they had allowed judgment to go by default to the same plaintiff in an earlier action on another bond for an amount based on the gold value of sterling (which was £183 3s 5d). Lord Maugham, the Lord Chancellor, who delivered the leading judgment of the House of Lords said, inter alia (at p 754):

> The doctrine of estoppel is one founded on considerations of justice and good sense. If an issue has been distinctly raised and decided in an action in which both parties are represented, it is unjust and unreasonable to permit the same issue to be litigated afresh between the same parties, or persons claiming under them. In my view, however, the doctrine cannot be made to extend to presumptions or probabilities as to issues in a second action which may be, and yet cannot be, asserted beyond all possible doubt to be identical with those raised in the previous action. *In the earlier action here, the only relevant issue was as to the true construction of the only bond then sued upon, and an allegation that other bonds of the same issue were in precisely the same form would have been irrelevant and improper. In fact, however, the statement of claim contained no such allegation. . . The issue of construction in the second action, could, indeed, be proved in the second action to be similar to that decided in the first, but it related to a different cause of action, based on other bonds, and could not be asserted to be the same issue.* (Emphasis added.)

Extrinsic evidence — admissibility

As there is not cause of action estoppel, I now have to consider whether the evidence adduced by the plaintiff is admissible and if so to determine its probative value. The nature of the evidence is as follows; (a) the three wills and the 1902 vow; (b) the articles of association of a Dutch company called NV Bouw Maatschappij Alkaff in which was recorded the shareholders thereof who were all descendants (including great-grandchildren) of the Alkaff brothers; (c) academic writing on the Sayeds of Hadramaut of Terim, viz (i) *A History of Singapore 1819-1975* by CM Turnbull at pp 100-101; (ii) a published lecture on 'The Saiyids of Hadramawt' and a monograph, *Historians and Historiography of Hadramawt*, both by RB Serjeant, Professor of Modern Arabic in the University of London; (d) the joint opinion of Prof Dr Ramzy El-Shaer and Prof Dr Abdel Meged Matlob of Ains Sham University, Cairo on 'The method of executing the wills of late Sayyid Shaikh at date of distribution'; (e) *Ameer Ali on Wakfs in Islamic Law*; *Tayyabji on Muslim Law* (4th Ed); *The Distribution of Estate According to Shaffi Law* by Prof Ahmad Ibrahim; Holy Koran (commentary by Yusuf Ali); (f) the second translation of the 1898 will by Prof JL Laliwala of the University of Ahmedabad, and his testimony on Islamic law and usage in the Arabic language.

Counsel for the trustees have contended that the 1902 vow and the 1898 will were not admissible in evidence, firstly, on the ground that they had not been properly proved and, secondly that in any case there

was no ambiguity in the capital clause. As to the first point, I am of the view that the 1902 vow and the 1898 will did exist although the originals have not been produced in court, and further that the copies are admissible as secondary evidence, given the circumstances of this case.

The next question therefore is whether there is an ambiguity in the capital clause. Counsel for the trustees founded his submission on the finding of Choor Singh J in OS 41/70. A careful reading of Choor Singh J's judgment reveals that his Lordship decided that the expression 'grandchildren' was plain, precise and unambiguous by looking at the expression itself without considering the context in which it was used. This was, in my view, a narrow approach to construction. A word like 'grandchildren' may have an ordinary or settled meaning, but it does not follow that it always has that meaning in the context in which it is used. If the capital clause is read as a whole, it is ambiguous. The capital clause did not provide, as Choor Singh J thought, an original gift and a substitutional gift. It created only one gift, ie to certain beneficiaries at the date of distribution, who might have been the living 'grandchildren' or, if there had been no living 'issue', those persons entitled under Islamic law. It was not a gift 'to A, but if A dies, then to B'. It was a gift 'to A if he lives, failing which, to B'. It was open to argument that because the settlors had provided that the Islamic heirs would not take until there was a total failure of 'issue', that the expression 'grandchildren' could, in the context, have meant 'issue'.

In the case of *Re Hall*,[23] Maugham J, in interpreting the expression 'grandchildren of any degree', said (at pp 265-267):

> In this case, I have to decide what is the right meaning to be put upon the word 'grandchildren of any degree' . . .
>
> The alternatives before me are, that the phrase 'grandchildren of any degree' refers to grandchildren of any stirpes, ie, to children of one of the five children of the testator, or that it refers to descendants of the testator, to be ascertained at the date mentioned in the codicil, in any of the steps of descent from the testator, using the word 'degree' in the not at all uncommon meaning of a step in the direct line of descent. The word 'grandchild' has a somewhat curious history, and the same observation applies to the words 'grandson' and 'granddaughter'. A perusal of the *Oxford Dictionary* shows that the word 'grand' is properly used, after the French example, to denote the second degree removed in ascent of relationship, as grandfather, grandmother, and so on; and is, by a false analogy (not following the French, who use the words 'petit-fils' and 'petite-fille'), used to denote the second degree removed in descent of relationship, as grandson, granddaughter, and so on. A number of examples are given in the dictionary, and I think that it may be said that the examples all tend to show that the words 'grandson', 'granddaughter', 'grandchild' and 'grandchildren' are generally used to indicate descendants of the second degree, ie children of children. It should, however, be observed that examples of that kind do not necessarily prove that the word 'grandchildren' is incorrect as applied to great-grandchildren, because comparatively few persons live to associate with or to see their great-grandchildren. If, for instance, it is said that a man was out walking with grandchildren and he has no great-grandchildren or none who could walk, the word is plainly used in its narrower sense.
>
> There have been two references to the matter in decisions which have been reported, and a judge may perhaps express his regret that those who collaborated in the production of the *Oxford Dictionary* did not extend their researches to the law reports, in which they would have found much material of value. The first of the two cases is *Hussey* v *Dillion*, in which the then Lord Chancellor, Lord Henley, said, in his judgment: '*Grandchildren* is a word of large extent, and, in common parlance, takes in everybody descended from the testator, and will have that effect, unless the intention appears to the contrary'. I do not rely on that statement as a binding decision that the word 'grandchildren' takes in everybody descended from the testator unless anything appears to the contrary; but at least it tends to show that at the date of the report, the year 1763, the then Lord Chancellor was of the opinion that 'grandchildren' was a word of large extent and, in common parlance, took in everybody descended from the testator.
>
> The second decision dealing with the point is *Earl of Orford* v *Churchill*. That was a case arising out of the construction of a will and a settlement, and it was unsuccessfully argued, inter alia, that the word 'grandchildren' would comprehend great-grandchildren. In my opinion, however, the judgment is no authority for the view that in a will the word 'grandchildren' with a suitable context may not properly be construed to include great-grandchildren and other descendants; and although it is now well settled that prima facie the word 'grandchildren' means descendants of the second degree, it is not impossible to find cases in which it is used in a wider sense. The derivation of the word, as I have pointed out, does not in any way indicate that it may not be so used.
>
> In the present case I have to give a meaning to the words 'grandchildren of any degree'. There is reason for using the word 'degree' as indicating steps in a line of descent, and I am of opinion that the testator used the word 'grandchildren of any degree' to indicate descendants of any degree (other than children) living at the date which he had mentioned.

I have cited the judgment of Maugham J in extenso to show that the meaning of the expression 'grandchildren' is not always plain, precise and unambiguous. I must however make it clear that I must not be understood as disagreeing with the actual decision of Choor Singh J.

Accordingly, I am prepared to accept the position that there is an ambiguity in the capital clause and in consequence admit the evidence adduced by the plaintiff for the purpose of determining the intention of Syed Shaikh. I start my review of the evidence by referring to the joint opinion of Professors Ramzy and Abdul Meged. They say that the testamentary trusts of Syed Shaikh as set out in his probated will did not discriminate against any of his testamentary heirs under Islamic law; the settlements would be discriminatory and contrary to Is-

lamic law if they had the effect of excluding the children of the deceased grandchildren from inheriting the capital thereof; that to make it conform with Islamic law, it would be necessary to allow the descendants, at the highest level, of the grandchildren to take the shares [of capital] of the deceased grandchildren; that under Islamic law, the beneficiaries are determined at the date of distribution of the capital and not the date of death of the defined persons; that, in respect of the 1893 settlement, the living great-grandchildren of all dead grandchildren would succeed to their parents' shares per stirpes, unless all those great-grandsons are also dead, in which case, their sons would be considered as 'grandchildren' for the purpose of the capital clause.

Prof Laliwala's evidence was as follows: he agreed with the joint opinion; that, having regard to the 1902 vow and the 1898 will and the other two wills, Syed Shaikh did not intend to exclude descendants of deceased grandsons from sharing in the capital of the settlement as he had created *wakfs* of his property, an act consistent with an intention to benefit his heirs; that in the Arabic language, there were several different words for 'grandchildren' and if the appropriate word was used, eg '*hafad*', it would convey the idea of descendants without end, but that if the intention was to limit the class to grandchildren in the sense of children of children, then the words '*Ibnul Ibnul*' would be used; and that when the expression 'grandchildren' was used in the 1893 settlement, Syed Shaikh could have had in mind the larger concept of 'grandchildren'.

Counsel for the plaintiff did not direct my attention to any particular part of the 1902 vow or the three wills to show how they were relevant either to construe the capital clause or to rectify it. He did however submit that these documents demonstrate the piety of Syed Shaikh as expressed in the 1902 vow and in making provision for his heirs in accordance with Islamic law.

Probative value of the 1898 will and the 1902 vow

As Prof Laliwala's evidence appeared to have been based on his understanding of what Syed Shaikh had said in the 1898 will with regard to the settlements, it is necessary that I examine the actual words of Syed Shaikh. I set out below the relevant passages (as translated by Prof Laliwala), together with my findings thereon:

> (3) There are houses in Singapore, both 999 leaseholds and freeholds which myself and brother Mohammad bin Abdulrahman Al-kaf made into a trust (*wakf*) for our children (*awladena*) and the children of our brother Abdullah bin Abdulrahman Alkaf, males and females (*Avlad-al-Akh Abdullah bin Abdulrahman Alkaf, Zakoor Wa Onas*), the provision to the male to be equivalent to the portion of two females, which is in one document. There are other two documents in respect of houses devised as trust only for our male children and the male children of our brother Abdullah bin Abdulrahman Alkaf.

Findings

The first trust referred to is the 1888 settlement for two reasons: (i) it was the only settlement in which Syed Mohamed was a settlor, and (ii) it was also the only settlement in which male and female children were given the income in that proportion.

The other two trusts referred to in the same passage are the 1893 and the 1898 settlements respectively. The apparent discrepancy between the earlier dating of the 1898 will (19 July 1988) and the later dating of the 1898 settlement [16 October 1898] can be satisfactorily explained.

> (4) Another trust document in English, the fourth one which is in respect of houses in Singapore following the other three in the terms (or conditions) of the trust (*Shorut-Al-Wakf*). The income on them shall be distributed among them (*bayehim*) (ie among beneficiaries mentioned above) and whoever dies, his share passes on to his successors (*levarasatehi*) and so forth in accordance with the documents written in the English language. If the children (*avlad*) or their children (*avlodohum*) or their descendants (their children *avlodohum*) quarrel about these trusts or the ruler orders them to be null and void, because they are in a Christian country and they annul them, they will not have any . . . responsibility . . . and the houses shall be distributed among the heirs (*varasate*) of Sayyad Abdullah and Sayyad Shaikh and their heirs in succession (*wa ala' varasate varasatehim*). Whatever instructions contained in the three abovementiond documents written in English regarding the houses in Singapore [creating all other trusts for the poor, etc] all become void. . .

The fourth trust document in English (which counsel for the plaintiff also could not identify) is the 1901 settlement for the following reasons:

(a) the codicil to the 1898 will was made on 2 Jamadil Awal 1320 (1902). Syed Shaikh started writing the 1898 will (which has 20 pages) in 1898 but did not complete it until after the execution of 1901 settlement of 16 October 1901;

(b) the probated will (dated 6 February 1910) refers to '. . . two wills, one of which is dated Jamadil Awal 1320 and relates to his interests in Arabia only . . .'. This said will is the codicil (consisting of one page only) to the 1898 will which has 20 pages. The codicil contains the words: 'If any beneficiary under this will *running from page one to page 21* . . .'. Obviously, when Syed Shaikh referred to the date 1320 AH, he was referring to both the will and the codicil as one and the same document;

(c) the four trusts mentioned in the 1898 will correspond, chronologically, to the first four settlements; and

(d) in this passage, Syed Shaikh said specifically that if the trusts were declared void, the houses 'shall be distributed among the heirs Syyad Abdullah and Syyad Shaikh . . . and their heirs in succession'.

Why were the heirs of Syed Mohammed not mentioned? The obvious answer was that Syed Mohammed had died in 1318 AH (1900 AD) leaving *no issue*. This omission supports the view that this part of the 1898 will was written after the death of Syed Mohamed.

Syed Shaikh's recollection of the terms of the income trusts of the four settlements was accurate and shows that he had a good memory. But the odd thing is that he did not say anything about the corpus except in the context of what would happen to the houses if the trusts were set aside. It is of course impossible to know what Syed Shaikh actually had in mind, but, it is possible to postulate a number of explanations for his cogitation, if not agitation. The first is that he was fully aware that his heirs and their heirs would succeed to the houses only in the event of the trusts being set aside by a court in Singapore, but not otherwise. This would be contrary to the notion that he had intended his remoter descendants to take the houses (the corpus). Secondly, why would he contemplate the possibility of his heirs taking steps to set aside the trusts unless he knew that he had favoured a select class of issue, viz namely, the living grandchildren at the date of distribution, to the exclusion of all other heirs? Thirdly, if he had intended that the capital should be distributed to his descendants in accordance with Islamic law, one would have expected him to have said something to the effect that he had fulfilled his obligations as a Muslim. Whether or not any of these speculative interpretations is correct is not as important as the fact that it is not possible to postulate an interpretation that can assist the plaintiff's case that Syed Shaikh had the intention as claimed in para 3(c) or para 4 of the summonses in these actions, merely by reading the relevant parts of the 1898 will.

Accordingly, I find that the terms of the 1898 settlement do not, on any reasonable reading thereof, support the plaintiff's case on the construction issue. This finding applies equally to the 1888 settlement. Having given careful consideration to the testimony of Prof Laliwala, I must also reject his opinion concerning the intention of Syed Shaikh. His evidence was mere conjecture, based on many assumptions of fact: (1) that Syed Shaikh had used the appropriate Arabic word; (2) that he had been misunderstood by the interpreter who had misinterpreted the word to the solicitor; and (3) that this misunderstanding and/or misinterpretation had occurred with every interpreter involved in the making of all the six Alkaff settlements.

I will now consider the other arguments made on behalf of the plaintiff, beginning with the comprehensive contention that the religious and educational upbringing of Syed Shaikh made it improbable that he would have discriminated against his heirs in distributing his properties in violation of the Sharia. This argument has no substance for two reasons. Firstly, there is no evidence that there was any discrimination at all. Prof Laliwala has confirmed that Islamic law does not prohibit a Muslim from making inter vivos dispositions of his properties, but he says it is morally wrong to do so. Why? It is morally wrong because a Muslim should follow the Sharia which requires that on his death, he must not dispose of more than one-third of the value of his estate in order that the remaining two-thirds shall be divided amongst his heirs in accordance with the rules of Islamic succession. But this rule of Islamic law does not and cannot prove the morality or otherwise of Syed Shaikh's action in making the two settlements, as at the time when they were made, no one could tell whether he would be in breach of the Sharia since he might still have other free properties or could continue to accumulate more wealth (which he actually did) which could still be inherited by his other heirs in accordance with the Sharia. In fact, Dr Ramzy Al-Shaer, in a letter dated 3 August 1987 to the plaintiff's counsel, adverted to this point when he observed that 'It is not clear from the documents I have whether the properties disposed by the trusts (wakfs) and the three wills exceed the hereditary shares or not.' So even up to today, there is no evidence that in retrospect, Syed Shaikh had violated the Sharia by discriminating against his heirs.

Secondly, Syed Shaikh had created six settlements where the corpus of each was given to the same class or classes of beneficiaries. In doing so, he must, on the plaintiff's argument, have followed the Sharia. In other words, he must have been aware that from the value of the properties he was giving to the grandchildren (even assuming that he intended the capital to be distributed in the manner set out in para 3(c)) that, on his death, he would or should have been able to provide for the hereditary shares in accordance with Islamic law. Otherwise, he would have violated the Sharia on each of the occasions the six settlements were made. This conclusion would undermine the very basis upon which the argument is founded.

So much for the extrinsic evidence. With respect to the internal evidence, one of the factual assumptions that Syed Shaikh had discriminated against certain of his heirs was that those grandchildren who were named as lives in being could not have shared in the corpus, for the obvious reason that they would be dead before the date of distribution could arrive. I do not think that this assumption is correct. It is based on a misreading of the capital clause which provided for two alternative periods for the vesting of the corpus, ie (i) last survivor of lives in being and 21 years, and (ii) 'at the time when all the children of the settlors and of their deceased brother Syed Abdullah . . . being dead the youngest child of such children who shall live to attain the age of twenty one years shall attain that age *whichever event shall first take place*'. It cannot be said that there was no possibility

of the second event occurring before the death of any of grandchildren who were also the lives in being.

I turn now to consider the actual words of the capital clause. It contains a clear direction that the contingent gift would vest in those persons 'as would be then entitled thereto according to Mohammedan law were the survivor of the settlor and the said Syed Mohamed . . . then to die possessed of the said trust premises intestate and in the share and proportions in which according to the same law such persons (if more than one) would be so entitled aforesaid . . .'. It has not been suggested by counsel for the plaintiff that the second half of the contingent gift is also contrary to the Islamic law of succession, as it plainly was not. It may therefore be argued that when Syed Shaikh specifically provided for the vesting of this contingent gift to beneficiaries in accordance with Islamic law, but in contrast thereto, expressly omitted a reference to Islamic law in relation to the first contingent gift, he must have intended that the gift was to take effect in the way he had expressed it.

Finally, and this is to my mind perhaps the most telling piece of evidence as to the intention of Syed Shaikh, he had, in relation to the income trusts, expressly provided for the manner in which the children of deceased beneficiaries were to take their parents' shares. There was no reason why he could not have used the same formula (which is what the plaintiff says should be applied to the capital clause) for the distribution of the corpus. It has not been suggested nor is there any evidence that Syed Shaikh was not aware of the difference between the two provisions. He, I might observe, repeated these two contrasting provisions in every one of the six Alkaff settlements.

Up to now, I have not been able to find anything in the extrinsic and the internal evidence to assist the plaintiff. However, if the construction sought by the plaintiff is understood for what it really is, I find that it contradicts the express words of the capital clause. As pleaded in para 3(c), the plaintiff says that the expression 'grandchildren' in the capital clause does not mean children of one's children but embraces the following classes of descendants at the date of distribution: (1) the living children of one's children; (2) if there are grandchildren who are dead, their living great-grandchildren would take their shares per stirpes; (3) if any such descendant were dead, his living children would take his share, and so on with the highest level of living descendant in the family tree taking the share of the deceased grandchild, to the exclusion of later generations. In support of this construction, the plaintiff has adduced expert evidence that this would be the effect under Islamic law on testamentary succession. The construction sought by the plaintiff in these two actions is therefore very different from that sought by the plaintiff in OS 41/70 where it was contended that all living issue, however remote, would take.

In my view, this construction encapsulates both meaning and effect. The meaning of the expression 'grandchildren' must be distinguished from the effect of giving it a particular meaning, although both exercises may involve the ascertainment of the intention of Syed Shaikh. The first determination concerns *who* are to take, the second *how* they are to take. If the construction point is broken down into its component parts, it is clear from the express terms of the capital clause that it is not possible, as a matter of interpetation, to construe the expression 'grandchildren' to mean both living and dead grandchildren. The point becomes obvious when reference is made to the actual words of capital clause. It refers to *living* grandchildren. Even if the expression 'grandchildren' were translated into 'issue' or 'descendants' of the same or remoter degree, the problem posed by the word 'living' cannot be overcome. It seems to me that what has happened here is the plaintiff commenced these actions on the basis that Islamic law was applicable to the construction of the capital clause and that this construction was pursued even after counsel had conceded that the proper law was English law. In my view, the construction claimed in para 3(c) cannot be sustained under English principles of construction.

Accordingly, I conclude that not only is there no internal evidence to support the plaintiff's construction of the relevant clause but such internal evidence as exists directly contradicts it. This conclusion applies equally to OS No 936/86.

Claim for rectification

I turn now to the claim for rectification under the amended para 4. It is, of course, not impossible that the capital clause as drafted might not have correctly expressed the intention of Syed Shaikh. Counsel has submitted that on the evidence that this is indeed the case and has cited the following authorities to show when a court will rectify the instrument, if necessary by remoulding the language: *Bonhote* v *Henderson*;[24] *Banks* v *Ripley*;[25] *Whiteside* v *Whiteside*;[26] *Re Butlin's Settlement Trusts*;[27] *Snell's Principles of Equity* and *Theobold on Wills* (13th Ed) at p 202.

The court has jurisdiction to rectify a deed in a proper case. What is a proper case depends on the circumstances of each case. In *Lister* v *Hodgson*[28] Lord Romilly MR said:

> If a man executes a voluntary deed in his lifetime declaring certain trusts, and happens to die, and it is afterwards proved, from the instructions or otherwise, that beyond all

> doubt the deed was not prepared in the exact manner which he intended, then the deed may be reformed, and those particular provisions necessary to carry out his intention into effect may be introduced.

In *Weir* v *Van Tromp*,[29] Byrne J applied the law as stated by Lord Romilly. Part of his reported judgment reads:

> ... yet he [the judge] ought not to act upon any but the clearest and most certain demonstration of error and of actual intention, and it was not immaterial to observe that he had not been referred to any reported case where judgment had been given in favour of reforming a voluntary settlement at the instance of a volunteer.

The standard of proof as laid down in the authorities is 'beyond all doubt' or 'the clearest and the most certain demonstration of error'. There must be 'strong irrefragable evidence' and as stated in *Snell*'s, 'This heavy burden of proof becomes even more difficult to discharge with the passage of the years.' Here, the plaintiff has made a valiant effort to discharge the burden 100 years after the first settlement was made and 80 years after the death of Syed Shaikh. He cannot possibly succeed on the claim for rectification when, on the same evidence, he has failed on the issue of construction. This conclusion also applies to the rectification action in OS No 936/86.

For the above reasons, I dismiss these two actions, both on construction and on rectification. I will now hear submissions on costs.

Applications dismissed.

Solicitors: *B Mohan Singh & Co*; *Wee Swee Teow & Co*; *G Raman & Partners*; *Leo Fernando*.

Reported by *Terence Tan Bian Chye*

British & Malayan Trustees Ltd v Abdul Jalil bin Ahmad & Ors

HIGH COURT (SINGAPORE) — ORIGINATING SUMMONS NO 387 OF 1990
THEAN J
15 NOVEMBER 1990

Trusts and Trustees — Sale of trust property — Application by trustees to court to order sale of trust property — Whether court has power to order sale where trust instrument expressly excluded power of trustees to apply for court order — Settled Estates Act (Cap 293, 1985 Ed), ss 4 & 6 — Trustees Act (Cap 337, 1985 Ed), ss 2(2) & 59

The plaintiffs are the trustees of a settlement. They applied for an order authorizing the sale of land and premises belonging to the trust ('the property'). The reasons for this were that the rental income from the property produced a very low rate of return, there were rising maintenance costs of the property, and as the property was relatively underdeveloped, there was also a strong possibility of compulsory acquisition. The plaintiffs were thus of the opinion that the property should be sold and the proceeds reinvested in first-class residential and/or commercial property. The second, third, seventh and eighth defendants opposed the making of the order. The issue was whether the court has power to order the sale of the property under s 4 of the Settled Estates Act.

Held, dismissing the application:

(1) However the property was acquired, it had been treated as settled property within the terms of the settlement, and in particular, the rental income from the property had been treated as income and distributed according to the trusts under the settlement. As such, the property was part of the settled estates under s 2 of the Settled Estates Act (Cap 293, 1985 Ed).

(2) Section 4 of the Settled Estates Act conferred on the court a power to order the sale of the whole or any part of the settled estates if it is considered proper and consistent with due regard for the interests of all parties entitled under the settlement. Section 6 however restricted this power to the extent which the sale of the property might have been authorized in and by the settlement of the settlor.

(3) Clauses 7 and 16 of the settlement made it clear that the settlor intended that the trustees should have no power, except to a limited extent, to sell the property, and further that the trustees were forbidden to invoke the jurisdiction of the court and to seek an order for the sale of settled property. Section 6 could not therefore come into effect.

(4) The court could under s 59 of the Trustees Act (Cap 337, 1985 Ed) confer on the trustees power to dispose of trust property, but this power was limited by s 2(2) of this Act. Clauses 7 and 16 showed a contrary intention expressed in the trust instrument such that the power of the court to order a sale under s 59 of the Trustees Act could not be invoked.

Case referred to

1 *Chapman* v *Chapman* [1954] AC 429 (distd)

Legislation referred to

Settled Estates Act (Cap 293, 1985 Ed) ss 4, 5, 6
Trustees Act (Cap 337, 1985 Ed) ss 2(2), 59
Civil Procedure Code (No XXXI of 1907) ss 1041, 1043